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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 491

E. E. MORGAN,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER

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Petitioner's reply to the arguments first raised in the Brief in Opposition follows:

I.

Most of Respondent's arguments converge as an effort to isolate the present case on what is called its "peculiar and unique" facts and thereby to persuade this Court that the issues involved are not of national concern or of sufficient importance to merit the Court's review.

The "peculiar and unique" facts to which reference is made consist of the statement that Morgan induced the United States Fidelity & Guaranty Company to continue writing construction bonds by giving guarantees against

loss and that he profited thereby. This is then tied to the assertion that when losses occurred, Morgan evaded the assumed obligations by an alleged criminal concealment of assets which should have been exposed to the lien and reach of the money judgment ultimately obtained.

However, these statements and assertions, taken at full face value, do not serve to make this case peculiar or unique on its facts or to distinguish it from any other of thousands of familiar commercial transactions occurring every day.

The example of another familiar commercial transaction will serve to illustrate the far-reaching consequences of the precedent which would be set by the Supreme Court of Mississippi if its decision on the Federal question is allowed to stand.

Thus, if *A* endorses *B's* note and induces a commercial bank to make a loan, which it would not otherwise have made, *A* becomes obligated to make good the debt and save harmless the bank from loss by reason of *B's* default.

Failing to respond completely to this obligation, it is quite easy to characterize *A's* omissions as "unjust, inequitable and unconscionable." The thousands of such transactions which occur on every business day of every week are essentially no different in law from Morgan's guaranty in the present circumstances.

If the guarantor persists in non-payment, the creditor may reduce the debt to a judgment and avail itself of all of the processes afforded under law for its enforcement, such as garnishment, execution, receivership, transfer injunctions and even bankruptcy. Absent waiver, however, the guarantor, as a judgment debtor, cannot be compelled to discover allegedly concealed assets where concealment

is made criminal, because this additional aid to collection runs head-on into the guarantee of the Fifth Amendment.

If non-payment could amount to a waiver, then there could never be an effective invocation of the privilege in a civil collection proceeding. Certainly in the familiar example above cited the debtor would be entitled to remain silent when called upon for discovery of assets if concealment were made criminal. Indeed, this is the clear and unmistakable holding of this Court in *Arndstein* v. *McCarthy* (1920), 266 U.S. 34, 45 S.Ct. 16.

We have only to add one ingredient to the cited example in order to substantially equate every existing commercial transaction with the circumstances of the present case. The ingredient would take the form of a printed clause on the promissory note on which credit is extended to the effect that "the makers and endorsers of this note agree to furnish to the payee financial statements on request." Or a less subtle clause might be added to the effect that "the makers and endorsers of this note, in the event of a default, expressly waive all privileges against self-incrimination under the Fifth Amendment to the Constitution of the United States."

The question remains: May such a prospective waiver clause in a purely private commercial contract document be invoked against a claim of the Fifth Amendment privilege when the debtor is charged in a post-judgment collection proceeding with criminal concealment of assets for the purpose of evading a judgment lien? If so, then in like manner, ad infinitum, every obligation of one party to indemnify or pay money to another may contain the same stereotype clause nullifying Fifth Amendment privileges. This is the very thing that prompted Judge Jerome Frank*

*Dissenting in *United States* v. *Field* (CA 2, 1951), 193 F.2d 92.

to observe that if prospective waiver by contract is generally accepted:

> ". . . the sole practical effect of the constitutional privilege will be to add a few words to a contract. So the high hopes of Madison and his fellows, expressed in this Fifth Amendment privilege, will end up in a rubber-stamp contractual clause. . . . Before long, rubber-stamped out of existence, the privilege will be but a quaint item of antiquarian lore." (193 F.2d at 107).

And just as a promise in ordinary private commercial transactions to make future disclosures cannot be specifically enforced as against the privilege claim, so it is in the case at bar.

It is submitted that this situation is not changed by broad assertions, as here, of reprehensible conduct or criminal concealments. There would never be an occasion to invoke the privilege against coerced testimonial self-incrimination if the individual involved were not being charged or being exposed to a charge of such conduct.

The Mississippi Supreme Court's decision deals with no peculiar nor unique circumstances, but if allowed to stand, the precedent will create a major area of erosion of the Fifth Amendment. Respondent's argument is an obvious effort to divert attention from this erosive consequence by the device of stigmatizing Morgan so as to make his claim of the privilege as unpopular and as reprehensible as possible. Such situations are the ones where the need to uphold and recognize the claim of the privilege becomes the most critical. It is easy to subscribe to constitutional privileges which are popular and attractive; it requires a deeper sensitivity to basic constitutional principles when the assertion of rights offends the moral senses of the majority.

If the individual debtor were obliged to defend or even deny such charges, in order to counteract the stigma cast upon him and to prevent some sort of estoppel being constructed out of contract or conduct, then the privilege would be circumvented completely, because the testimonial contradiction of the charges would make full disclosure relevant and would indeed result in a waiver under the very decision upon which Respondent appears to rely, namely *Brown v. United States* (1958), 356 U.S. 148, 78 S.Ct. 622 (Resp. Br. p. 17)

II.

Respondent argues that "The decision below does not turn upon a finding that there has been a technical 'waiver' by contract. Instead, the court below has applied basic principles of estoppel and waiver announced in numerous prior decisions of this Court." (Resp. Br. p. 13).

However, the Court expressly eliminated principles of waiver and estoppel in the general and technical sense and placed its decision on "waiver by contract." This portion of the decision was prefaced by the following observation to this effect:

> ". . . In view of the terms of this application, appellant's letter acknowledging acceptance of such terms, and our prior opinion that the Shively agreement was a valid and binding instrument, we do not find it necessary to discuss whether or not the technical requirements of a waiver or estoppel were complied with. . . ." (222 So.2d at 831; Addendum p. A33).

In any event, there are no "basic principles of estoppel and waiver" apparent in this case apart from (1) the alleged breach of an agreement to pay losses and furnish financial statements, and (2) the alleged criminal transfer and concealment of assets. Therefore, it is apparent that there is nothing peculiar or unique in the facts of this case

up to this point by which it may be set apart from any other commercial transaction involving circumstances where one party fails to pay his contractual obligation and the creditor is unable to locate assets from which collection can be made. These circumstances have never heretofore been held to destroy the constitutional privilege against self-incrimination.

The "prior decisions of this Court" referred to in Respondent's argument apparently consists of the case of *Sheppard* v. *Barron* (1904), 194 U.S. 553, 24 S.Ct. 737, on which the Court below placed its sole reliance. This case was discussed and distinguished in Petitioner's original argument. No cited case involved the right to remain silent in the face of possible incrimination, nor did the Court in the *Sheppard* case construct an estoppel out of a prospective waiver under the terms of a private contract.

While the *Sheppard* case is authority for the broad generality that constitutionally based rights are subject to waiver and estoppel, the circumstances of the cited case are wholly foreign to those in the present case and bear no remote similarity. As Mr. Justice Frankfurter observed for this Court in *Hughes* v. *Superior Court of California* (1949), 339 U.S. 460, 70 S.Ct. 718:

> ". . . Generalizations are treacherous in the application of large constitutional concepts." (70 S.Ct. at 723).

III.

Respondent argues that "the decision below is not based upon any alleged doubt as to the applicability of the privilege in civil cases." Also, it is argued that "the decision is not based upon the ground that recognition of the privilege would impair what Morgan calls the court's 'collection powers'." It is said that Morgan's argument to that effect is a "rank distortion of the court's opinion."

The decision of the Supreme Court of Mississippi speaks for itself. The very core of the decision is found in that Court's language quoted below:

> "Judgments and decrees are entitled to proper respect when rendered and public policy requires nothing less. The citizenry of the state has the right to expect their orderly enforcement and surely the litigants, who have a direct personal or pecuniary interest in the outcome of a suit, have the basic right to demand the enforcement of the judicial processes. The effectiveness of our entire court system rests upon the court's ability to enforce its judgments; otherwise they would become mere 'scraps of paper' evidencing only the good intentions of the court, and reducing its orders and the attempted enforcement thereof to an exercise in futility. The thought pervades that the constitutional privilege is largely related to criminal prosecution, which is only to say that the government or state must prove its case against an accused without the aid of the accused's testimony, if he desires to invoke the privilege. However, in a civil proceeding we express doubt that it was ever intended that the privilege could be transformed into an affirmative device whereby a judgment debtor can effectively thwart the processes of the court. . . ." (222 So.2d at 832; Addendum p. A34).

The quoted language proceeds from a misreading of the case cited and relied upon, namely *Zap* v. *United States* (1946), 328 U.S. 624, 66 S.Ct. 1277, discussed and distinguished in Petitioner's original argument. It casts the privilege against self-incrimination expressly in doubt when invoked in a civil proceeding to collect a judgment, such doubt being spawned under the view that the constitutional plea interferes with the Court's collection or enforcement powers and threatens to make of its judgments "'mere scraps of paper'". There can be little question but that this viewpoint, expressed in the above quoted language,

predominantly influenced the Court below in rejecting the privilege plea. It is no less clear that the viewpoint thus adopted cannot stand against the Fifth Amendment right to remain silent when criminally charged in a civil action.

IV

It is argued that the privilege is not involved because "The decree does not even specify that these written statements be made under oath."

Petitioner has proceeded upon the assumption that any answer to the discovery decree in chancery relating to the transfer and location of allegedly concealed assets had to be under oath, and this for the simple reason that a waiver of the oath would have the effect automatically of waiving discovery. It is so established in this jurisdiction, as to which see *Palmetto Fire Ins. Co.* v. *Allen* (Miss., 1925), 141 Miss. 681, 105 So. 482.*

While Respondent's position has been noted with considerable interest, we have detected no expressed intent on the part of Respondent to abandon its insistence upon a discovery in chancery or to waive the oath. In any event, attempted coerced discovery in chancery, whether under oath or not, is subject to the claim of the constitutional privilege. 27 *C.J.S.*, Discovery, § 5b.

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*In the cited case the Court said:

". . . Under the equity practice proper, in the absence of statutes, it is necessary for the answer to be sworn to. The oath is the thing that makes the discovery evidence, and it is that which distinguishes it from a mere pleading. In the absence of statute providing otherwise, a bill of discovery cannot be taken pro confesso. 6 Am. & Eng. Enc. Pl. & Pr. 732. A bill for discovery cannot be maintained if it waives answer under oath, for a waiver destroys the adequacy of the answer as regards discovery and turns it into a mere pleading. 6 Am. & Eng. Enc. Pl. & Pr. 732." (105 So. at 483).

See also *Dodson* v. *Hutchinson* (Miss., 1927), 148 Miss. 640, 114 So. 736.

V

It is argued that Morgan failed to plead the privilege in opposition to the demand for a financial statement. But the record does not bear out this argument.

The Bill of Complaint alleged that the Complainant was entitled to discovery, as part of which it claimed the right to be furnished a financial statement. The former case had produced a money judgment and a general declaration in the final decree there entered that Morgan was obligated to perform his contractual agreements. But the former decree did not direct or enjoin that Morgan file a financial statement or make any other form of discovery or specifically perform anything.

The basis for the prayer of the present Complaint for a financial statement, as well as the prayer for discovery in general, was the allegation of criminal concealment of assets. Morgan plead the privilege against self-incrimination and denied Complainant's entitlement to the relief thus prayed for. Not until the decree was entered in the present case was Morgan specifically called upon and enjoined to furnish a testimonial financial statement and discovery of the details which could be used as evidence leading to prosecution for criminal concealment.

Detailed exceptions were filed immediately upon entry of the decree in the present case. These asserted again the right to remain silent, this time against the discovery directions mandated in the final decree, which included the furnishing of a searching financial statement in a specified form.

It is submitted that the privilege was fully claimed at each and every critical point in the case, both in the trial court and on appeal. The references to the record are contained in the Petition.

VI.

On the possible criminal involvement of Morgan surrounding the Chancery Court's mandatory transfer injunction, the violation of which could amount to criminal contempt, Respondent argues that Petitioner was not privileged to "select" one requirement of the decree and contend that he cannot be required to perform the other requirements

The answer is that there was no "selection" in the sense of anything voluntary. The transfer injunction was not prohibited by any constitutional right or guarantee. Morgan has never contended otherwise. He had no choice but to comply with the injunction. He purported to do so by executing a quitclaim transfer to the Receiver. The only choice was exercised by Respondent. It asked for the injunction, obtained it and accepted its fruits. Having done so, it stands in no position to say that Morgan may be coerced into a testimonial discovery which could tend to inoriminate for violation of the injunctive order for the conveyance of not some but *all* assets.

It is submitted that in no event can there be a waiver of the right to remain silent when exposure to criminal prosecution is involved, as here, on a criminal law passed after execution of the contract said to constitute the waiver. No court has ever before imposed waiver of the right to remain silent when exposed to prosecution under such an ex post facto law.

VII.

On the receivership due process point, the mere appointment of the litigant as receiver was not alone the basis for the objection. The objection was and is to granting to such a biased receiver the "broad visitatorial and inquisitorial powers" to be exercised in the Court's name as an

adversary, with only ex post facto supervision. Where a court, either directly or through its appointed agent, deliberately sets itself up as an adversary to one of the litigants before it, the judicial function is abrogated and due process of law in its most fundamental aspects is denied. The trial court had ruled that the Receiver "is not, and ought not to be, indifferent between the parties, since his duties require him to be the active adversary" of Morgan (R. 1477). That the Supreme Court of Mississippi below has sanctioned such a procedure is apparent from the statement of the questions presented, one being "The propriety of the appointment of appellee's agent with *broad visitatorial and inquisitorial powers*" (222 So.2d at 825; Addendum p. A21). The Court concluded with the observation that "the full powers of the receiver would be restored" (222 So.2d 833; Addendum p. A36).

The Receiver was an officer of the Court, and as such was at least a quasi-judicial officer. Yet he was admonished to act as an adversary. He was the alter ego of his employer, the United States Fidelity & Guaranty Company, which had a large pecuniary interest in the case. Certainly bias was evident. In the case of Courts, freedom from bias, prejudice and financial interest is a constitutional principle. Those acting for the Court in a judicial or quasi-judicial capacity "must not only be unbiased but must avoid even the appearance of bias." *Commonwealth Coating Corp.* v. *Continental Casualty Co.* (1968), 89 S.Ct. 337. See also: *Turney* v. *State of Ohio* (1927), 273 U.S. 510, 47 S.Ct. 437.

CONCLUSION

Never before has any court declined, as here, to respect a Fifth Amendment plea in a proceeding for discovery in aid of judgment creditors where enforced discovery could tend to incriminate, but the decisions are consistently, and without exception, to the contrary, as to which see especially *Arndstein* v. *McCarthy*, supra.

Never before has any court, as here, cast the constitutionally based privilege in doubt on the ground that to respect the privilege would serve to evade a civil judgment or impair the Court's collection powers or make of a civil judgment "mere scraps of paper." But the authorities, on the contrary, have heretofore consistently respected the privilege in collection proceedings.

Never before has any court, as here, found a waiver of a properly claimed Fifth Amendment privilege against testimonial self-incrimination in virtue of a purely private contract given prior to the advent of the occasion for invoking the privilege.

In only one case in the annals of legal history has a waiver been set against the privilege to withhold *testimonial* discovery on the basis of contract, even in the area of *public trust*, and this case, *United States* v. *Field*, supra, has been twice contradicted by the same court and finally rejected by the Supreme Court of the United States in *Curcio* v. *United States* (1957), 354 U.S. 118, 77 S.Ct. 1145.

It is submitted that a license should not be granted to rubber-stamp out of existence the constitutional privilege against self-incrimination by permitting circumvention on the basis of stereotyped contract clauses in private commercial contract transactions.

It is submitted that the Petition should be granted, and that the writ should issue.

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